No. 18-525

In The
Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the Country, comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those treated illegally in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Employee Rights Advocacy Institute for Law & Policy ("The NELA Institute") advances workers' rights through research and advocacy to achieve equality and justice in the American workplace. Founded in 2008, The NELA Institute is NELA's related charitable public interest organization that

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[1] Pursuant to Sup. Ct. R. 37.6, Amici submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than Amici, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

works hand in hand with NELA to create diverse, equitable, and inclusive workplaces in which there is mutual respect between employers and employees. The NELA Institute also seeks a wage for workers that provides at least a healthy standard of living in an environment free of discrimination, harassment, retaliation, and capricious employment decisions.

NELA and The NELA Institute have an interest in this case because the question presented to the Court is whether Title VII's administrative exhaustion process is a jurisdictional prerequisite to suit, creating unnecessary obstacles for victims of discrimination seeking relief, or a processing rule appropriately allowing unsophisticated victims of discrimination to navigate the EEOC's administrative process without having their claims dismissed if they don't perfectly fill out the forms used to process their claims. The Court's decision will impact not only NELA's members and their clients who are victims of discrimination, but also our country's commitment to the elimination of workplace discrimination through Title VII of the Civil Rights Act of 1964.

SUMMARY OF ARGUMENT

Interpreting Title VII's administrative investigative process as a jurisdictional requirement would unjustly limit the available paths to remedy employment discrimination. Because Title VII's procedures are intricate and initiated by laypersons, the accompanying

Title VII administrative process initiating those procedures should continue to be flexible and one that can be navigated by workers unsophisticated in legal technicalities. There is no reason to believe, and neither Fort Bend County nor its amici curiae have provided any evidence to substantiate, that a non-jurisdictional administrative exhaustion process would encourage an influx of lawsuits. Employees who believe they are victims of employment discrimination have no incentive to file meritless lawsuits or otherwise bypass the EEOC process in favor of costly litigation in federal court.

In contrast, under Fort Bend County's interpretation, employers would have an incentive to delay raising hyper-technical procedural issues until after litigation. This case illustrates that point. Here, the employer failed to play its "trump card" for five years, unnecessarily increasing the time spent in litigation. Pet'r's App. 14a. This delay has wasted the resources of the EEOC, the courts, and Ms. Lois Davis. Congress intended Title VII to provide remedies for victims of prohibited discrimination in the workplace and to eliminate further employment discrimination. An informal administrative exhaustion process, rather than a strict administrative pleading requirement, best furthers this purpose.

ARGUMENT

Title VII of the Civil Rights Act of 1964 was enacted by Congress with a goal of eradicating discrimination within the workplace. Initiating the EEOC's investigative process is simply part of a preliminary procedure for resolving the employee's claims, and not a jurisdictional predicate to suit. The heart of Fort Bend County's argument is that an employee's right to have their employment discrimination claim heard in court should be foreclosed because they failed to check a box on a federally developed charge form designed to expedite the clarification and investigation of charges. Here, Ms. Davis filed a timely charge of discrimination, indicating "religion" was part of her charge when she wrote "religion" on her EEOC questionnaire. J.A. 70-71, 90. Yet, because she failed to check the box saying "religion," Fort Bend County argues that her right to pursue this claim is foreclosed. In Fort Bend County's view, checking this box is a jurisdictional requirement which strictly narrows the scope of any subsequent litigation, regardless of later identified evidence. Pet'r's Br. 54. Under Title VII, the Court has never limited the scope of an employee's claim on such a technical, non-substantive ground, and the Court should not start now.

I. THIS COURT HAS CONSISTENTLY REJECTED A STRINGENT APPLICATION OF TITLE VII'S PROCEDURAL PROCESSING RULES.

Filing a charge with the EEOC is a condition precedent to bringing a Title VII claim in federal district court. This Court has previously reviewed Title VII's technical prerequisites and has yet to find any of them, such as employee-numerosity or timeliness, to be jurisdictional. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) (employee-numerosity prerequisite); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (timeliness of charge). This Court has also held that an intake questionnaire may, on its own, be enough to constitute a charge, thus empowering the EEOC to investigate. *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) ("[I]f a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."). Finally, the Court has recognized that filing a timely charge of discrimination "is subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 103 (2002).

In *Arbaugh*, this Court held that Title VII's employee-numerosity prerequisite was not jurisdictional. *Arbaugh*, 546 U.S. at 516. This Court explained that Congress had the power to make the prerequisite technically jurisdictional and intentionally did not do so. *Id.* at 514-15. Specifically, this Court stated that "[i]f

the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Id.* at 515-16 (emphasis added). It was further emphasized that rendering the employee-numerosity prerequisite jurisdictional would be "unfair[] and [a] waste of judicial resources." *Id.* at 515 (internal quotations omitted). Similarly, in *Zipes*, this Court held that a timely filing with the EEOC is not jurisdictional. *Zipes*, 455 U.S. at 393. The Court explained that the section discussing jurisdiction did not limit the district court's jurisdiction to cases with a timely EEOC filing. *Id.*

Here, Ms. Davis filed a timely charge with the appropriate state agency by filling out the agency's forms and indicating both her sex and religion as reasons for her termination. J.A. 70, 99-101. Similar to the analysis in *Arbaugh*, the legislature here has never "clearly stated" that checking all the right boxes on EEOC's intake form is a jurisdictional matter. Congress knows how to create a jurisdictional bar and did not do so here. Also similar to *Arbaugh*, it would be both unfair and a waste of judicial resources to dismiss a case because a layperson plaintiff failed to check a box when submitting an EEOC charge. Fort Bend County raised its jurisdictional objection for the first time after the Fifth Circuit Court of Appeals remanded the case, Pet'r's App. 21a-22a, and only after having vigorously contended that its actions did not constitute religious discrimination. Fort Bend County argues the case should be dismissed on jurisdictional grounds because

Ms. Davis failed to check the right box on the right form. Treating administrative exhaustion as jurisdictional gives defendants, and Fort Bend County here, an unfair advantage. Allowing defendants to raise the question of administrative exhaustion at any time strips a court's power to hear employment discrimination claims and incentivizes defendants to postpone raising the issue as a last resort. Under Petitioner's position, employers can file a motion to dismiss, a motion for summary judgement, and go to trial without ever raising an administrative exhaustion defense. There is no justification for allowing an employer to save the administrative exhaustion argument as a back-up plan if they receive an unfavorable verdict.

Finally, as discussed in detail in Resp't's Br. 5-7; J.A. 70, 99-101, Ms. Davis asserted both sex and religion as reasons she believed[2] she was terminated. As in *Holowecki*, this was enough for the EEOC to investigate her charge. Ms. Davis, a layperson, should not have her right to bring suit abolished because of a procedural pitfall.

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[2] Ms. Davis, a layperson, can only state reasons why she believes she was discriminated against. She cannot be expected to know Fort Bend County's actual motivations nor, as a layperson, come to a legal conclusion as to what the evidence may establish during a subsequent investigation. For further discussion, *see infra*, Section II.B.

II. AS A LAYPERSON INITIATED PROCEDURE, THE MAZE THAT IS TITLE VII'S EEOC ADMINISTRATIVE PROCESS SHOULD BE INTERPRETED AS FLEXIBLE AND NON-TECHNICAL.

The EEOC's administrative process for accessing Title VII relief is too complex to be interpreted as a strict jurisdictional requirement. The steps necessary for relief "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Holowecki*, 552 U.S. at 403; *see also Egelston v. State Univ. Coll. at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976) ("Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced attorney, yet [their] enforcement mechanisms are usually triggered by laymen."). This Court has ruled that "Title VII [] is a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988); *see also Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."); *Zipes*, 455 U.S. at 397 (applying identical reasoning).

Laypersons begin this complex process while the EEOC and the courts are tasked with its completion. While filing the initial charge form may be simple, courts reviewing these claims consistently find that the entire process is confusing and complex. *See Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 892 (2d

Cir. 1971) (stating that "the intent of Title VII is remedial and that plaintiffs under it should not be held accountable for a procedural prescience that would have made a Baron Parke happy or a Joseph Chitty proud[ ]"); *Antonopulos v. Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E.D. Cal. 1968) (stating that "[t]his law is a remedial one, and the Congressional purpose would not be furthered by making . . . members of the working class who are generally without substantial higher education, dot every 'i' and cross every 't' on their way to the courthouse[ ]"). The EEOC chooses to investigate only after a layperson files a charge alleging discrimination. Therefore, courts should not be barred from considering meritorious claims of discrimination because the employee did not "dot every 'i' and cross every 't'" in the initial charge form.

The Supreme Court categorizes statutory filing procedures as nontechnical, and notes that "[s]uch technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love*, 404 U.S. at 527. This Court most recently explicitly recognized that:

> Documents filed by an employee with the EEOC should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies. Construing ambiguities against the drafter may be the more efficient rule to encourage precise expression in other contexts; here, however, the rule would

> undermine the remedial scheme Congress adopted. It would encourage individuals to avoid filing errors by retaining counsel, increasing both the cost and likelihood of litigation.

Holowecki, 552 U.S. at 406 (2008).

In light of Title VII's complex procedural obligations, which are initiated by, and meant to protect, laypersons, the information on an initial charge form cannot be used as an bar to justice. The charge form requires the layperson to conclude the reason for the harm done without first knowing the employer's motivation. Instead, the most important part of a layperson's charge of discrimination are the factual allegations made, not the layperson's ability to successfully guess the legal conclusion before an investigation even occurs. To cut off an employee's right to bring an antidiscrimination suit because he or she incorrectly guessed the legal conclusion underlying the discriminatory actions would be unduly harsh and undermine the purposes of Title VII.

A. Processing an employment discrimination charge with the EEOC is an intricate and complex process that is initiated by laypersons, not lawyers.

The EEOC's administrative process for reaching an ultimate determination on a charge is a complex and elaborate undertaking that begins when an aggrieved employee files a charge of employment

discrimination with the appropriate state and federal authorities. Employees typically navigate the state and federal administrative processes without the aid of legal counsel or a clear understanding of the relationship between the claim filing process and subsequent lawsuit. Because Fort Bend County and its amici curiae boast of the clarity and simplicity of the EEOC's process for investigating a claim, it is important to understand this process and the administrative complexity involved. To be clear, it is not the actual filing of a discrimination charge with the EEOC that clouds a layperson's understanding of this process—an employee can easily fill out a charge form and file the charge with the Commission—it is the employee's ignorance of the EEOC's process that compels a layperson's reliance on the Commission to properly investigate the charge and reach an appropriate determination.

The EEOC is tasked with the broad authority of investigating and attempting to conciliate violations of various federal antidiscrimination laws, which include: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act of 1990, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1963, the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008. 42 U.S.C. §§ 2000e-4(g), 2000e-5(a); 29 C.F.R. § 1601.1 (2019). The Commission begins its investigative process when an employee files a charge with the EEOC alleging an employer "has engaged in an unlawful practice." 42 U.S.C. § 2000e-5(b); 29 C.F.R.

§ 1601.13 (2019). Alternatively, if an employee resides in a jurisdiction with applicable state and local anti-discrimination laws, then generally, the employee must first file the discrimination charge with the local Fair Employment Practice agency ("FEP") before the EEOC can exercise its federal jurisdiction over the complaint. 29 C.F.R. § 1601.13. Because federal and state antidiscrimination laws have concurrent jurisdiction over claims of employment discrimination, section 706(c) of Title VII directs the EEOC to allow state and local authorities the exclusive right to process claims of discrimination for a period of sixty days. 42 U.S.C. § 2000e-5(b). The EEOC applies this deference policy through work-sharing agreements with FEP agencies and exercises its jurisdiction over a charge after sixty days from when the FEP agency received the charge or once the FEP agency has concluded its investigation. 42 U.S.C. § 2000e-5(c) to (d); 29 C.F.R. § 1601.13.

Because this claim filing process is usually initiated by laypersons without the assistance of legal counsel, the EEOC does not require the complaining party to identify all potential forms of discrimination in the initial charge. 29 C.F.R. § 1601.12 (2019). For the EEOC to begin its investigation, the charge must simply state an employer's identifiable violation of Title VII. *Id.* The EEOC will generally not dismiss a charge so long as the charge is "sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.* Once the EEOC determines the charges fall within the scope of its

authority, the Equal Opportunity Specialist investigates the factual allegations to determine whether there is reasonable cause to "believe the charge is true[.]" 42 U.S.C. § 2000e-5(b). The EEOC has broad power to investigate any discrimination on the part of the employer related to the factual allegations in the charge form. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984) (stating that, "Since the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer."). After the investigation is completed, the EEOC will either dismiss the charge or will attempt to resolve the issue through informal means of "conference, conciliation, and persuasion" if it finds reasonable cause. 42 U.S.C. § 2000e-5(b).

Regardless of the results of the EEOC's investigation, the Commission issues a right to sue letter in every case, unless the Commission has been otherwise successful in resolving the dispute. The EEOC issues a right to sue letter: (1) when, during the administrative investigation, the aggrieved party requests in writing that a notice of right to sue be issued; and (2) after the EEOC has made a determination on the charge. 29 C.F.R. § 1601.28(a)-(b) (2019). Essentially, the EEOC recognizes an employee's right to move forward with a discrimination claim in court and attempts to facilitate this action by issuing a right to sue letter upon the conclusion of its investigation.

The EEOC's investigative process and its ultimate determination of reasonable cause—or the lack

thereof—should not preclude an aggrieved employee from moving forward with litigation. Because the EEOC's charge filing process is intended to help laypersons investigate allegations of workplace discrimination, the process should not be used in a way that extinguishes an employee's right to file a claim in court.

B. Requiring laypersons to make legal conclusions when checking the boxes on an EEOC charge form at the outset of an investigation is unreasonable and stringent.

The heart of Fort Bend County's argument is that Ms. Davis failed to check the right box at the outset of the EEOC administrative proceeding. Pet'r's Br. 8. Fort Bend County argues for a rule that would require laypersons to guess the correct legal conclusion prior to any fact gathering. Adopting such a rule would place an unreasonable burden on those who believe they have experienced workplace discrimination. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-63 (5th Cir. 1970). The "crucial element[s]" of an EEOC charge are the underlying factual allegations, not the boxes checked on a simple form at the outset of an investigation. *Id.* at 462. "[T]he only procedural requirement which should confront a Title VII complainant is the requirement that he state . . . *facts* sufficient to trigger a Commission investigation." *Id.* (emphasis original).

The Fifth Circuit explained in *Sanchez* that there could be many reasons why an aggrieved party fails to check the "correct" boxes on an EEOC form and that "none of [these reasons] should cut off the charging party's rights." *Id.* The Fifth Circuit further reasoned that checking the box at the outset of a proceeding is merely a legal conclusion, and to cut off a party's rights simply because they failed to assume the correct legal conclusion is "inconceivable." *Id.* The filing of a charge triggers the EEOC's investigatory powers, and at the time of filing, the charging party may only know limited facts surrounding the discriminatory treatment. Although the charging party "may have precise knowledge of the facts concerning the 'unfair thing' done to him, [he may] not be fully aware of the employer's motivation for perpetrating the 'unfair thing.'" *Id.* In fact, an employer may not provide an explanation for the action, leaving the true reason for the "unfair thing" unknown to the employee until the employee files a complaint in federal district court, leading to discovery.

Further, the EEOC may uncover additional, previously unknown discriminatory reasons for the adverse employment action that were not included in the original charge. The original charge simply provides the EEOC with "a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices." *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975). Essentially, Fort Bend County argues that because Ms. Davis did not have the psychic ability to predict the correct magic words to

capture all the possible bases that may have been a reason for her termination in her initial charge form, that her religious discrimination claim should be precluded. Pet'r's Br. at 54-55. Should this Court adopt this position, an aggrieved employee would be encouraged to make protective filings by checking all possible boxes to ensure they do not lose their right to bring a suit on a claim. Alternatively, an uncertain employee may just leave all boxes on the form unchecked out of fear of ruining their chances to bring their claim to court.

Clearly, EEOC's charge filing process and accompanying procedural obligations within Title VII are far from simple. Its complexity is overwhelming to navigate for laypersons victimized by workplace discrimination. These processes should be construed as nontechnical so that laypersons who have experienced workplace discrimination are not barred from seeking justice because of a technical omission during this process.

III. A WAIVABLE ADMINISTRATIVE EXHAUSTION DEFENSE SERVES THE PUBLIC INTEREST OF EFFECTIVELY ELIMINATING DISCRIMINATION IN THE WORKPLACE.

The public and the courts have an interest in efficiently resolving employment discrimination claims. In fact, the public's desire for timely resolutions of employment discrimination cases is fueled by the remedial nature of statutes such as Title VII.

Administrative processes are meant to promote efficiency by allowing certain forfeitures, waivers, and adaptions when justice dictates to better service victims of discrimination and preserve judicial resources. In contrast, a strict jurisdictional requirement of an administrative process would hinder procedural efficiency by providing employers with excuses for delay. Further, administrative exhaustion as a waivable defense would provide necessary remedy for disadvantaged victims of employment discrimination without increasing filing of frivolous lawsuits or allowing bad faith filers to act without penalty. Congress explicitly worked to eliminate employment discrimination through legislation such as Title VII, the primary intent of which is not to create "an integrated scheme of administrative and judicial review" hindering filers, as Fort Bend suggests, but rather to provide a remedy for victims of employment discrimination. Pet'r's Br. 23. Administrative exhaustion as a waivable defense furthers this remedial intent.

A. Flexible administrative exhaustion serves the public interest of judicial efficiency and furthers Congressional intent to eradicate discrimination.

Fort Bend County acknowledges that "Title VII's exhaustion requirement promotes judicial efficiency by facilitating voluntary resolution of claims." Pet'r's Br. 47. However, Fort Bend County's stringent jurisdictional approach defeats this goal of efficiency. If an administrative exhaustion objection can be held as a last

resort, employers like Fort Bend County can waste judicial time and resources. In a flexible approach, an employer can still raise exhaustion claims, provided they are timely.

Contrary to Fort Bend County's position, employees are not eager to file claims of discrimination in federal court instead of working with the EEOC. Pet'r's Br. 28 (stating that, "allowing employees to circumvent the administrative process would undermine Congress's objective of encouraging non-judicial resolution of employment discrimination claims"). Many employees lack the resources to engage in costly litigation and there is no indication that there has been an increase in meritless claims in those circuits which have held that these claim processing requirements are not jurisdictional. A flexible administrative exhaustion procedure allows the courts to efficiently process claims of discrimination and effectively eliminate discrimination from the workplace.

1. Finding administrative exhaustion to be jurisdictional incentivizes employers to delay raising administrative objections and waste judicial resources.

A main purpose of administrative exhaustion is to promote efficiency. *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). Title VII incorporates an administrative process to promote prompt resolution of discrimination claims. Treating these processes as jurisdictional

obstructs this goal because a claim against jurisdiction "can never be forfeited or waived." *Arbaugh*, at 514. Consequently, an employer could raise a jurisdictional exhaustion claim at any stage of litigation, "even after trial and the entry of judgment." *Id.* at 506. Although "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," the Court has "tried in recent cases to bring some discipline to the use of this term." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). In *Henderson*, the Court noted that among the rules inappropriately "branded" jurisdictional are claim processing rules designed to "promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* Title VII's administrative requirement is designed to promote orderly progress of discrimination claims and this efficient design warrants against the jurisdictional label.

Without the threat of waiver, employers are free to save administrative exhaustion defenses until after they take their chances at trial. As Fort Bend County's counsel recognizes, expecting an employer to bring an administrative exhaustion defense is "akin to trusting the fox to guard the hens." Pet'r's Br. 30. "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Henderson*, 562 U.S. at 434. The waste and unfairness that results when an employer is allowed to use an affirmative defense to dodge an unfavorable verdict is evident. If a party successfully

asserts a lack of jurisdiction after trial ends, "many months of work on the part of the attorneys and the court may be wasted." *Id.* Knowing the claim cannot be waived, an employer has no incentive to raise the argument before court resources have been spent. This ploy to delay accountability and waste resources was apparent to the Court in *Arbaugh* and it is clear from the facts of the present case.

The Court in *Arbaugh* was critical of the employer who waited to assert a jurisdictional argument until after it lost at trial. The Court highlighted how the employer was able to "try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." *Arbaugh*, 546 U.S. at 515. The Court held that the Title VII employee-numerosity requirement was not jurisdictional and "could not be raised defensively late in the lawsuit, i.e., after Y & H had failed to assert the objection prior to the close of trial on the merits." *Id.* at 504. The Court reasoned that "[g]iven the unfairness and waste of judicial resources entailed in tying the employee-numerosity requirement to subject-matter jurisdiction," the requirement was not jurisdictional. *Id.* at 502. The jurisdictional construction Fort Bend County asks this Court to adopt encourages employers to use the exhaustion defense in the same way the employer in *Arbaugh* raised its defense—as a safeguard to an unfavorable ruling.

Here, the waste of resources is exacerbated by Fort Bend County's failure to raise the exhaustion defense for five years. The Fifth Circuit discussed the unreasonable delay in Fort Bend's exhaustion defense

during the second appeal. "Simply put, Fort Bend waited five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust." *Davis v. Fort Bend County*, 893 F.3d 300, 307 (5th Cir. 2018). Fort Bend County missed the chance to make this claim and should not be allowed to erase five years of unfavorable appeals in a last-ditch effort to evade liability. Without a waiver component, employers have no incentive to raise administrative exhaustion defenses in a timely manner. Surely, when Congress added an administrative component to Title VII to promote efficiency, it did not intend to equip employers with the tools to waste resources in an effort to sidestep liability.

2. Contrary to Fort Bend County's unsupported assertions, a waivable administrative exhaustion defense will not lead to an influx of frivolous lawsuits in federal court.

Fort Bend County suggests, without foundation, that employees will "skip the administrative process and go straight to federal court" absent a strict jurisdictional bar. Pet'r's Br. 26. They offer no data or facts to support this "the sky will fall" argument. In fact, Fort Bend County's argument ignores the stark reality faced by victims of employment discrimination. These victims are often consumed with finding meaningful employment after a devastating termination or rejection for promotion and are wholly uninterested in spending years in federal litigation. The Court has

found several of EEOC's procedural filing provisions to be not jurisdictional, *see* cases cited *supra* p. 5-7, yet Fort Bend County cannot point to a corresponding flood of litigation in district courts in response. This Court should not be swayed by Fort Bend County's empty threat of increased litigation, because employees have every incentive to instead exhaust claims of discrimination with the EEOC.

A waivable administrative exhaustion process will not create an influx of frivolous lawsuits in federal courts because Title VII's administrative process benefits employees. "Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust." *Woodford*, 548 U.S. at 89 (discussing the advantages of administrative review). Under Title VII, employees are motivated to voluntarily exhaust administrative options because it is cheaper, faster, and hopefully the most effective way to move forward. Employment litigation is expensive and "[t]he cost of litigating such claims is beyond the means of the average employee and an even greater hurdle for the discharged employee with substantially reduced income." Ann C. Hodges, The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace, 22 Hofstra Lab. & Emp. L.J. 601, 609 (2005). Many employees lack the resources necessary to hire an attorney, resulting in 19% of employment discrimination cases from 1998-2017 being litigated pro se. Mitchell Levy, Empirical Patterns of Pro Se Litigation in Federal District Courts, 85 U. Chi. L. Rev. 1819, 1841

(2018). Even when employees are able to secure "expensive and often elusive legal representation . . . [e]mpirical studies of employment law claims show that plaintiffs have limited success at every level of the process." Hodges, *supra* at 611.

However, when an employee files with the EEOC, the EEOC works to eliminate the discriminatory practice through "informal methods of conference, conciliation, and persuasion." *Mach Mining, LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1651 (2015). The EEOC's considerable power in these cooperative measures means charges of discrimination will be "resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Woodford*, 548 U.S. at 89. Further, "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *Id.* When the EEOC investigates a charge, the employer is required to articulate a reason for its actions and this record can be useful for employees as evidence in later discovery or to decide whether a case should be pursued if it survives administrative review. Because of these advantages, "some aggrieved parties will voluntarily exhaust all avenues of administrative review before resorting to federal court, and for these parties an exhaustion requirement is obviously unnecessary." *Id.* Considering the disparity in resources between victims and their employer, employees have every incentive to work with the

EEOC in hopes of reaching a cost-effective agreement before proceeding directly to costly litigation.[3]

There is no indication that a waivable administrative exhaustion process will lead to an influx in frivolous lawsuits by victims of employment discrimination. Nevertheless, if Fort Bend County is still concerned about protecting employers from unnecessary or premature litigation, further remedy is found in Title VII's explicit instruction that "the court may, in its discretion, stay further proceedings for . . . further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1). A stay effectively empowers the EEOC's role in enforcing Title VII by providing the EEOC with necessary autonomy during their investigation. A stay also effectively relieves employees by providing a work environment free of unlawful discrimination. Employers are in no way prejudiced by adopting Ms. Davis's interpretation of Title VII's administrative exhaustion process because the employer

[3] Should an employee deliberately skirt the EEOC, the courts are not without recourse. Rule 11 requires the party bringing a claim to certify that: (1) to the best of its knowledge, the claim is not brought for an improper purpose, such as harassment; (2) there is a valid basis for the claim; and (3) that factual contentions have or will have evidentiary support. Fed. R. Civ. P. 11(b). Therefore, if the court finds that Rule 11 has been violated, the court may impose a sanction on the violating party. Fed. R. Civ. P. 11(c). The court also has discretion to award a defendant attorney's fees in the case that Title VII litigation is brought in a manner that is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith," *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978). These discretionary measures will continue to deter frivolous litigation under a flexible administrative exhaustion process.

never loses the ability to object. If an issue arises where the procedural process has not been complied with, the courts have the power to grant a stay and further address the issue.

Fort Bend County's harsh jurisdictional approach inappropriately suggests the court's only option to ensure use of Congress's "preferred means" of cooperation and voluntary compliance is to dismiss an unexhausted allegation. Pet'r's Br. 28. This mandate not only disregards the court's power to stay the proceedings but also the court's power to order the EEOC to conciliate. If an employer presents "credible evidence" to the court that the EEOC did not "provide the requisite information about the charge or attempt to engage in discussion about conciliating the claim . . . the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance." *Mach Mining*, 135 S.Ct. at 1656. Fort Bend County offers no explanation of how the court's power to stay the proceedings and order conciliation will be insufficient to allow the opportunity for voluntary compliance when an employer asserts a timely exhaustion defense.

Fort Bend County's claim that employees will circumvent the EEOC also overlooks that many Title VII claims "necessarily overlap" with 42 U.S.C. § 1981. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 455 (2008). Section 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981(a). While both

statutes provide independent remedies for intentional discrimination, "Title VII requires that those who invoke its remedial powers satisfy certain procedural and administrative requirements that § 1981 does not contain." *Humphries*, 553 U.S. at 455. Even though § 1981 has no administrative procedure, Fort Bend County cannot point to a rush of employees using § 1981 claims to circumvent the EEOC and bring claims of employment discrimination directly to federal court, likely because "Title VII provides important administrative remedies and other benefits that § 1981 lacks." *Id.* Because of the benefits of the administrative review process, employees will continue to bring allegations of discrimination to the EEOC.

The rigid jurisdictional approach suggested by Fort Bend County only helps employers delay responsibility of diligent litigation. Contrary to Fort Bend County's assertion that the "sky will fall" if this Court holds administrative exhaustion to be a waivable defense, there is little reason for victims of discrimination to circumvent the EEOC. Employees face a significant disadvantage accusing an employer of discrimination and prefer to utilize EEOC's expertise to settle these claims. Thus, a waivable administrative exhaustion defense best serves the public interest in effective eradication of discrimination from the workplace.

B. Continuing to treat EEOC procedures with flexibility furthers Congress's primary goal of eliminating workplace discrimination.

In passing Title VII, Congress recognized the ultimate significance of ending discrimination in the workplace. Congress believed that the persistence of discrimination in the workplace had the ability to preclude individuals from participating in various facets of life. As stated in the legislative history of Title VII:

> [T]he right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter into a restaurant or hotel is shallow victory where one's pockets are empty. The principle of equal treatment under the law can have little meaning if in practice its benefits are denied.

H.R. REP. NO. 88-194, at 2516 (1964) as reprinted in 1964 U.S.C.C.A.N. 2391, 1963. The Supreme Court, addressing the issue of employment discrimination in various cases, emphasized the primary purpose of Title VII. *See Franks v. Bowman Transp. Co. Inc.*, 424 U.S. 747, 763 (1976) ("[I]n enacting Title VII . . . Congress intended to prohibit practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin and ordained that its policy of outlawing such discrimination should have the highest priority."); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801

(1973) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."). In the face of these strong expressions of purpose, it is hard to envision Congress intended victims of discrimination to lose their right to pursue claims in federal court simply because they failed to check a box on an EEOC form. Yet, that is precisely what Fort Bend County asks this Court to do by arguing that these procedural technicalities should be treated as jurisdictional bars.

Downplaying the elimination of workplace discrimination as the primary congressional goal of Title VII, Fort Bend County argues that Congress's main goal was to create "an integrated scheme of administrative and judicial review," which requires that charges of discrimination be brought before the EEOC first and later to the courts if the EEOC is unable to resolve the claim. Pet'r's Br. 23-24. Fort Bend County goes on to argue that "the text, structure, and purpose of Title VII make it abundantly clear that Congress intended to grant courts jurisdiction only over claims that have been brought before the EEOC." Pet'r's Br. 18.[4] Certainly, it is possible that one of the purposes of Title VII was to adopt "an integrated scheme of

[4] It is important to note that Davis did bring her claims of sex discrimination and retaliation before the EEOC and allowed for investigation. After her initial complaint with the EEOC, Davis submitted an amended questionnaire, which included the word "religion" next to the checklist labelled "Employment Harms or Actions." *See* J.A. 90.

administrative and judicial review." Pet'r's Br. 23. However, that objective cannot override the ultimate purpose of Title VII, which is the elimination of discrimination in the workplace.

Given Title VII's primary purpose of ending workplace discrimination, Title VII is remedial in nature. *See Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) ("Title VII is a broad remedial measure, designed to assure equality of employment opportunities."). Based on the remedial nature of Title VII, this Court has avoided making technical constructions. *See International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 381 (1977) (reasoning that because Title VII was a remedial statute intended to eliminate invidious employment practices it should "be given liberal interpretation and exemptions from its sweep should be narrowed"); *Washington County v. Gunther*, 452 U.S. 161, 178 (1981) (reasoning that the Court should "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate").

Despite the explicit directive from this Court to reject over-technical constructions of Title VII, Fort Bend County argues that this Court should construe Title VII strictly based on conclusions implicitly drawn from cases unrelated to Title VII. Pet'r's Br. 18-21. However, this would be directly in conflict with cases that have already clearly established that Title VII is a remedial statute which should be construed liberally in order to give effect to the main congressional goal of ending workplace discrimination. The obvious necessity in

avoiding hyper-technical interpretations of Title VII is especially evident in this case. If this Court were to accept Fort Bend County's arguments, Ms. Davis, as a victim of discrimination would be punished for failing to check a box and the discrimination Congress sought to remedy under Title VII would go unaddressed. Therefore, in determining how to interpret Title VII's exhaustion requirement, this Court should fully consider the purpose and nature of Title VII in order to achieve the goals intended by Congress.

CONCLUSION

Title VII's administrative exhaustion requirement is a waivable claim processing rule meant to guide unsophisticated victims of discrimination through the legal terrain of filing a complaint under Title VII. Strictly requiring administrative exhaustion as a jurisdictional prerequisite to suit would only create unnecessary obstacles for victims of discrimination seeking relief. There is no reason to believe a waivable administrative exhaustion requirement would lead to an increase of potentially frivolous Title VII claims in federal courts. Beyond the EEOC's responsibility to conciliate claims presented to them is the responsibility to provide an effective remedy for victims of discrimination in the workplace. Therefore, a hyper-technical process goes against Congressional intent by unduly burdening the laypersons initiating the Title VII investigations. Relying on "[t]he structure of Title VII, the congressional policy underlying it, and the

reasoning of [this Court's] cases," this Court should hold that Title VII's procedural processing rules are "not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393.

Respectfully submitted on April 3, 2019,

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